

Applicant : Gable, et al.
Serial No. : 09/665,326
Filed : September 19, 2000
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Attorney's Docket No.: 08407-005002

REMARKS

Reconsideration and allowance of the above-referenced application are respectfully requested. Claims 1-17 are pending, with claims 1 and 10 being independent.

Double- Patenting Rejection

Claims 1-17 are rejected as allegedly being unpatentable over claims 6-13 of U.S. Patent No. 6,151,443 to Gable et al. (hereinafter "Gable"). This rejection is traversed.

The double-patenting rejection is improper because claims 1-17 are non-elected claims from a parent application where a requirement for restriction was made.

A double-patenting rejection cannot be made if a divisional application, filed after a restriction requirement, includes non-elected claims of the parent application. According to MPEP 804.01,

The third sentence of 35 U.S.C. 121 prohibits the use of a patent issuing on an application with respect to which a requirement for restriction has been made, or on an application filed as a result of such a requirement, as a reference against any divisional application... This apparent nullification of double patenting as a ground of rejection or invalidity in such cases imposes a heavy burden on the Office to guard against erroneous requirements for restrictions...

The current application claims priority to Gable as a divisional application. During the prosecution of Gable a restriction requirement was mailed on August 23, 1999, asking the applicant to choose from two groups of claims. In response to that requirement, a second group of claims were non-elected, which included claims 39-47 and 56-63 of the originally filed application. On September 9, 2000, the non-elected claims of Gable were filed in the current application as claims 1-17.

Thus, a double-patenting rejection is prohibited in this application because of the restriction requirement in Gable.

Conclusion

In view of the above remarks, therefore, all of the claims should be in condition for allowance. A formal notice to that effect is respectfully requested.

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It is believed that all of the pending claims have been addressed. However, the absence of a reply to a specific rejection, issue or comment does not signify agreement with or concession of that rejection, issue or comment. In addition, because the arguments made above may not be exhaustive, there may be reasons for patentability of any or all pending claims (or other claims) that have not been expressed. Finally, nothing in this paper should be construed as an intent to concede any issue with regard to any claim, except as specifically stated in this paper.

Please apply any charges or credits to deposit account 06-1050.

Respectfully submitted,

Date: _____

8/19/2004



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